UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act	))))	Proposed Rule RIN 1010-AD17

COMMENTS OF THE WILLIAMS COMPANIES

The Williams Companies (Williams) hereby comments on the proposed rule entitled "Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act," 72 Fed. Reg. 17,047 (April 6, 2007) (Proposed Rule). In the Proposed Rule, the Minerals Management Service (MMS) proposes new regulations to establish complaint procedures and processes to administratively adjudicate allegations by a shipper that it has been denied open and nondiscriminatory access to an Outer Continental Shelf (OCS) pipeline contrary to sections 5(e) and 5(f) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1334(e)-(f). As discussed more fully below, the Proposed Rule's formal complaint resolution process exceeds the Secretary of Interior's statutory authority and directly conflicts with the formal complaint adjudication process which Congress expressly and exclusively conferred upon the courts in the OCSLA.

I. THE WILLIAMS COMPANIES

Through various subsidiaries, Williams owns and operates various natural gas pipelines across the Gulf of Mexico. These proposed regulations therefore are of particular importance to Williams.

Given the importance of this matter to it, in response to MMS's advance notice of proposed rulemaking, 69 Fed. Reg. 19,137 (April 12, 2004) (Advance Notice), Williams submitted Comments on June 14, 2004 and Responsive Comments on November 19, 2004, and participated in the various public meetings scheduled by the Advance Notice. Williams appreciates this further opportunity to comment in response to the Proposed Rule.

II. COMMENTS

A. The Backdrop To This Rulemaking Illustrates The Need For Careful Consideration Of The Lines Of Authority Prescribed By Congress

Back in 2000, the Federal Energy Regulatory Commission (FERC), claiming authority under the OCSLA, promulgated regulations requiring OCS natural gas transporters to periodically file pricing and service information intended to enhance open and nondiscriminatory access. In *Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003) (*Williams*), the Court held that the OCSLA does not confer upon FERC the authority to issue such regulations; FERC's authority under the OCSLA is narrowly confined to assisting in the determination of "ratable take" orders. More specifically, the Court held:

(1) OCSLA section 5(e) "simply requires the Secretary of Interior to condition grants of right-of-way on the holder's agreeing to non-discriminatory transportation duties." *Id.* at 913.

(2) "Without some explicit provision to the contrary (as exists for quantification of the ratable take duty), Congress presumably intended that enforcement would be at the hands of the [shipper] obligee of the [rights-of-way] conditions, the Secretary of Interior (or possibly other persons that the conditions might specify)." *Id.* at 913-14.

(3) "Except as to ratable take orders, the language supports no such [enforcement] role for FERC." *Id.* at 914.

In light of *Williams*, MMS issued the April 12, 2004 Advance Notice "to assist [MMS] in potentially amending our regulations regarding how the Department of the Interior (DOI) should ensure that pipelines transporting oil or gas under permits, licenses, easements, or rights-of-way on or across the Outer Continental Shelf (OCS) 'provide open and non-discriminatory access to both owner and non-owner shippers' as required under section 5(f) of the Outer Continental Shelf Lands Act (OCSLA)." In particular, the Advance Notice sought comments addressing: "what you think 'open and non-discriminatory access' means" (Advance Notice at 19,139); "what factual information or data would be necessary to make a determination that open access has been denied or that discrimination has occurred, what mechanisms MMS could use to gather such information, and the extent to which the information should be made public" (*id.*); "the scope, magnitude, and seriousness of any instances where access or discrimination problems were encountered" (*id.*); "the types of complaints that it might receive if it did establish a hotline" and "the advantages and disadvantages of resolving the complaints through an informal negotiation or a more rigorous dispute resolution process" and "the possible structure of either an informal or formal complaint resolution process" (*id.*).

In answer to those questions posed in the Advance Notice, the Proposed Rule concludes: "open and nondiscriminatory access" cannot be manageably defined and is best left for determination in the adjudication of individual situations (Proposed Rule at 17,048); no justification is found for routine reporting of information given the ability to obtain case specific information on an as needed basis (*id.* at 17,054); the problems sought to be addressed by the MMS have been rare, and indeed, "it appears that the industry has been able to resolve [through the normal course of business] all but a very few of the type of complaints which the proposed rule would address" (*id.* at 17,057).

Yet, despite these findings and conclusions, MMS proposes a formal administrative complaint process, a proposed solution that seems on its face to be in search of a problem. This is particularly so in light of the OCSLA-prescribed judicial process which already exists to address these very complaints if and when they should arise, as discussed more fully below.

B. Contrary To The Proposed Process Of Administrative Adjudication Of Private-Party Complaints, The OCSLA Expressly And Exclusively Confers This Adjudication Authority Upon The Courts

OCSLA section 23 provides for so-called "citizen suits" as the exclusive means for private parties to formally challenge "actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter." 43 U.S.C. § 1349(a)(6). Section 23 makes clear the exclusivity of such private-complainant "citizens suits" in stating that "all" such complaints "shall be undertaken in accordance with the procedures described in this subsection." *Id.* OCSLA section 23 further provides that, except for certain actions of the Secretary of Interior that are reviewable in the U.S. Courts of Appeal, "the district courts of the United States shall

have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the Outer Continental Shelf which involves . . . production." *Id.* § 1349(b)(1). "Production" is broadly defined by the OCSLA to include the "transfer of minerals to shore," i.e., the transportation of oil and gas on the OCS. *Id.* § 1331(m).

Moreover, Congress in OCSLA section 23 expressly prescribed the Secretary of Interior's role in such exclusive private-complainant "citizens suits." First, section 23 provides that no such private-party action may be commenced "prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary [of Interior] and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring and to any alleged violator." *Id.* § 1349(a)(2)(A). Second, section 23 provides that the Secretary of Interior may request that the Attorney General intervene in any such action commenced pursuant to this section. *Id.* § 1349(a)(4). Thus, just as Congress expressly limited FERC's role under the OCSLA, Congress expressly limited the Secretary of Interior's role in such exclusive formal complaint adjudication process.

The Conference Report in the legislative history of the 1978 amendments to the OCSLA expressly confirms "the exclusivity of the citizen suit." H.R. Rep. No. 95-1474, at 113-14 (1978). Caselaw under parallel onshore pipeline access provisions under the Mineral Leasing Act (MLA) likewise reveals that enforcement there is a matter of judicial, rather than administrative, adjudication. *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46 (D.C. Cir. 1953).

Accordingly, the Proposed Rule's formal complaint resolution process directly conflicts with the exclusive "citizen suit" complaint resolution process mandated by Congress in the OCSLA.

C. Routine Rulemaking Authority Cannot Be Used To Create Authority To Administratively Adjudicate Private-Party Complaints

In response to comments to the Advance Notice questioning the authority to administratively adjudicate private-party complaints contrary to the OCSLA's express and exclusive provisions requiring judicial adjudication, the Proposed Rule (at 17,051) merely replies:

> MMS disagrees. The OCSLA specifically grants the Secretary of the Interior the authority to "prescribe such rules and regulations as may be necessary to carry out the provisions of [the OCSLA]." 43 U.S.C. 1334(a). Nothing in section 1349 or section 1350 limits that rulemaking authority. Nor is there anything in section 1334(e) or (f) that exempts those provisions from the general grant of rulemaking authority.

However, it is well established that such routine grants of authority to an agency to prescribe rules and regulations necessary to its administration of an act is not a license to create authority beyond that conferred upon the agency by Congress. *See, e.g., New Eng. Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972) *aff'd*, 415 U.S. 345 (1974). Clearly, the Secretary of Interior's general, routine rulemaking powers cannot be used to create authority to administer a private-party complaint adjudication process which Congress expressly and exclusively conferred upon the courts to administer.

Moreover, contrary to the Proposed Rule's statement (above) that "[n]othing in section 1349 . . . limits that [section 1334(a)] rulemaking authority," section 1349(a)(6) makes clear that "citizen suits" are the exclusive means of challenging "violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter." 43 U.S.C. § 1349(a)(6). Plainly, Congress conferred upon the courts the exclusive authority to adjudicate private-party complaints regarding violations of the OCSLA and regulations promulgated thereunder, and did not authorize the

Secretary of Interior to promulgate regulations that would interject a formal administrative adjudication process to resolve such private-party complaints.

D. Consistent With Congress's Express Choice Of Judicial Adjudication, The Courts Are Far Better Suited To Address Such Private-Party Complaints

The wisdom of Congress in conferring upon the courts the exclusive authority to adjudicate private-party complaints is manifest. Thus, for example, courts do not have the conflict of interest which MMS concedes having as a shipper of Royalty-in-Kind production (Proposed Rule at 17,048) and as the beneficiary of "royalty payments [that] would also increase" as the result of MMS decisions favorable to complainants which will "increase revenue received by shippers/producers" with a corresponding "decrease in tariff revenue paid to pipelines" (*id.* at 17,057).

Moreover, rather than excluding from the subject administrative adjudication process any complaint regarding a "FERC pipeline" so as to defer to FERC on pipelines under the jurisdiction of the Natural Gas Act (NGA) or Interstate Commerce Act (ICA), as proposed by MMS (Proposed Rule at 17,050), the courts would have no reluctance whatsoever to adjudicate complaints regarding all OCS pipelines. Moreover, while understandable given DOI's lack of administrative hearing and appeals processes comparable to those of FERC (*id.* at 17,051), MMS's deference to FERC simply cannot be legally sustained given the extremely limited role which the *Williams* court found to be conferred upon FERC by Congress under the OCSLA.

The apparent difficulty in distinguishing the pro-competitive forms of regulation under the OCSLA from the command-and-control forms of regulation under the NGA and ICA further illustrate the wisdom of Congress in establishing a complaint adjudication process in the courts, to the exclusion of any such formal administrative

adjudication process. Thus, not only does MMS find it difficult to define "open and nondiscriminatory access" (Proposed Rule at 17,048), but MMS appears to view these words as if they were being applied under the NGA and/or ICA.

For example, MMS envisions the types of complaints to generally fall under two categories: "(1) Rate discrimination and (2) denial of access," with "rate discrimination" simply being one shipper "being charged a higher rate than other similarly situated shippers." Proposed Rule at 17,050. But, unlike the NGA and ICA, nowhere does the OCSLA proscribe "rate discrimination" so as to strictly require commensurate rates for all "similarly situated shippers." While the competitive principle of "open and nondiscriminatory access" under the OCSLA could potentially be violated by prohibitively, anticompetitively discriminatory rate treatment, this is not a matter simply of "rate discrimination" such as that strictly proscribed under the NGA and ICA.

Under OCSLA section 5(f), "The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334(f)(1)(A). To understand what Congress meant by these words, it is important to recognize the objectives and the means selected (and/or rejected) to achieve such "open and nondiscriminatory access to both owner and nonowner shippers."

In the 1978 amendments to the OCSLA, Congress was addressing reports that integrated petroleum companies were restricting access to their pipelines by nonowner, unaffiliated shippers[1] – hence the reference to "access to both owner and nonowner

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[1] *See* H.R. Rep. No. 95-590, at 290 (1977) (Additional views of Reps. J. Seiberling, C. Dodd, J. Eilberg, G. Miller, M. Udall); *see also* 124 Cong. Rec. H26,784 (daily ed. Aug. 17, 1978) (statement of Rep. Seiberling concerning creating of "bottleneck monopolies" through inadequate sizing of pipelines); 124 Cong. Rec. H1627 (daily ed. Jan. 31, 1978) (citing various documents regarding pipeline sizing concerns).

shippers" and hence the "ratable takes" provisions whereby pipelines can be required to transport or purchase oil or gas in the vicinity in proportionate amounts, without discrimination. Moreover, in promulgating the 1978 amendments, Congress rejected proposed legislation that would subject all OCS gas pipelines to NGA regulation and all OCS oil pipelines to ICA regulation;[2] thereby, instead of such pervasive command-and-control forms of regulation, Congress ultimately adopted "Competitive principles governing pipeline operation," including "open and nondiscriminatory access." 43 U.S.C. § 1334(f).[3]

In stark contrast, in establishing "common carrier" status for pipelines transporting oil or natural gas through "Federal lands" under the Mineral Leasing Act (MLA), Congress expressly excluded from the definition of "Federal lands" all "lands on the Outer Continental Shelf." 30 U.S.C. § 185(b)(1). Thus, just as it had rejected proposed legislation that would have subjected OCS pipelines to pervasive command-and-control forms of regulation, Congress was careful to confirm this choice in excluding OCS pipelines from such pervasive "common carrier" form of regulation under the MLA.

Clearly, Congress in the OCSLA purposefully chose not to subject OCS pipelines to common-carrier or other utility-type forms of pervasive regulation, such as those under the MLA, ICA or NGA. Instead, Congress chose to regulate under the OCSLA based on

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2 *See* 124 Cong. Rec. H2093 (daily ed. Feb. 2, 1978); *see also* 124 Cong. Rec. H2092-93, H2097 (daily ed. Feb. 2, 1978) (Congress likewise rejected a proposal to amend section 5(3) to require that all OCS pipelines transport "without discrimination and at reasonable rates."

3 *See also* 43 U.S.C. § 1332(3) ("consistent with the maintenance of competition"); 43 U.S.C. § 1801(7) ("to preserve and maintain competition"); 43 U.S.C. § 1802(2)(D) ("to preserve and maintain free enterprise competition"); 43 U.S.C. § 1334(a) (requiring consultation with the Attorney General on "matters which may affect competition").

competitive principles. Correspondingly, Congress in the OCSLA also clearly chose not to commit this form of competition-based regulation to administrative adjudications (such as that which typically accompanies common-carrier or other utility-type regulation), but rather to create private-party rights of action in court.

Again, it is important to be mindful of the objectives and means selected by Congress to achieve "open and nondiscriminatory access to both owner and nonowner shippers." In the 1978 amendments to the OCSLA, Congress was addressing anticompetitive conduct exhibited by integrated petroleum companies, with affiliated pipeline and shipper-producer interests, discriminating against non-owner shippers by denying access to their pipelines and thereby placing them at a competitive disadvantage. Pipeline owners that have no affiliated shipper-producers, on the other hand, do not have that incentive to deny or restrict access to competing producers. Their incentive is to optimize throughput from any and all shippers. In the Proposed Rule, MMS appears to have lost sight of the objectives and means which Congress carefully addressed in the OCSLA -- matters of anticompetitive conduct which Congress understandably called upon the courts to adjudicate.

III. CONCLUSION

Williams applauds MMS's efforts here to consider carefully its statutory authority for the Proposed Rule before finalizing it. The *Williams* case, which is the impetus for these rulemaking proceedings, illustrates the need to avoid overstepping the lines of authority so deliberately prescribed by Congress in the OCSLA. This is all the more important where, as here, there is a compelling need to reconcile the Secretary of Interior's role under the OCSLA with that of the Federal Judiciary, lest needless, misplaced, and wasteful litigation will result.

Perhaps the best outcome of this rulemaking proceeding would be a clear, concise statement of policy by the MMS as to its understanding of the competitive form of regulation which Congress fashioned for the OCSLA in contrast to the pervasive utility-type and common-carrier forms of regulation of the NGA, ICA, and MLA. Moreover, without infringing upon the formal private-party complaint resolution authority delegated to the courts by the OCSLA, there appears to be a lawful role for the DOI to administer an informal, voluntary complaint resolution process, such as the "hotline" process in the Proposed Rule.

Respectfully submitted,

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